

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DONALD W. LIETZKE, JR.**

Claimant

VS.

**TRU-CIRCLE AEROSPACE and  
TECT AEROSPACE**

Respondents

AND

**GREAT NORTHERN INSURANCE COMPANY and  
ZURICH AMERICAN INSURANCE COMPANY**

Insurance Carriers

Docket No. 1,020,992

**ORDER**

Respondent Tru-Circle Aerospace (hereafter "Tru-Circle") and its insurance carrier Chubb Group of Insurance Companies (Great Northern Insurance Company) (hereafter "Chubb Group") appeal the December 1, 2006 Award of Administrative Law Judge John D. Clark. The Appeals Board (Board) heard oral argument on February 16, 2007.

**APPEARANCES**

Claimant appeared by his attorney, Dale V. Slape of Wichita, Kansas. Respondent Tru-Circle and its insurance carrier Chubb Group appeared by their attorney, Jeff S. Bloskey of Overland Park, Kansas. Respondent Tect Aerospace (hereafter "Tect") and its insurance carrier Zurich American Insurance Company (hereafter "Zurich American") appeared by their attorney, Ryan D. Weltz of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).<sup>1</sup> In addition, at oral argument to the Board,

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<sup>1</sup> The exhibits attached to the May 3, 2005 preliminary hearing were also included in the record considered by the Board, as explained on page 4 of this Order.

the parties stipulated that the 22 percent whole body functional impairment rating opinion from Michael H. Munhall, M.D., is the only rating opinion in this record. Therefore, the 22 percent whole body functional disability award of the ALJ is affirmed, with the liability of the respondents to be determined below.

### **ISSUES**

Respondent, Tru-Circle, and its workers compensation insurance carrier, Chubb Group, raised the following issues in their Application For Review By Workers Compensation Appeals Board:

1. Claimant's date of accident.
2. Whether claimant sustained a series of injuries or aggravations from October 2004 and continuing.
3. Whether claimant's injury or condition, need for treatment and resulting permanent impairment was the natural and probable consequence of an injury on March 18, 2004, or resulted from a series of injuries or aggravations, each and every day during claimant's employment with Tect Aerospace, beginning in October 2004 and continuing.
4. Whether Tru-Circle Aerospace or Tect Aerospace is responsible for payment of benefits.
5. Whether Tru-Circle Aerospace and Chubb Group are entitled to reimbursement for medical and temporary total disability benefits paid to claimant during the time claimant was employed by Tect Aerospace and during which workers' compensation coverage was provided by Zurich American Insurance Co.<sup>2</sup>

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record contained herein, the Board finds the Award of the ALJ should be modified to find that claimant suffered an accidental injury on March 18, 2004, with continuing liability through October 17, 2004, for which Tru-Circle and its insurance company shall be liable, and a new series of accidental injuries from and after October 18, 2004, for which Tect and its insurance company shall be liable.

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<sup>2</sup> Respondent's Application for Review at 1-2.

Claimant worked for respondent Tru-Circle as a welder. On March 18, 2004, claimant slipped on something wet on the floor and did the splits, catching himself before he fell to the ground. When claimant's feet slipped, he heard a popping sound. Within one or two hours, claimant began experiencing tenderness and stiffness in his right hip. Claimant was referred to and treated by Merrill A. Thomas, D.O. Claimant was diagnosed with a right hip sprain and a right knee sprain from the incident. Conservative treatment was successful, and claimant improved until he was released from further treatment, to full duty, in May 2004. Claimant did report continuing dull pain at that time.

In mid-July, claimant's work changed from the more sit-down job he had been moved to, to a job which required more standing. This resulted in a flare-up of his hip pain. Claimant was provided more physical therapy and, by August 2004, after also receiving an epidural injection for a preexisting back problem unrelated to this injury, improved to the point where he was again released from treatment by Dr. Thomas. On August 20, 2004, claimant reported that he was symptom-free. Claimant had no complaints from August 20, 2004, until the end of October 2004. It should be noted that claimant had a previous, unrelated injury to his back that resulted in lumbar spinal stenosis, for which he received periodic lumbar epidural steroid injections at the L3-L4 level. Claimant's prior injuries resulted in claimant having a 50-pound weight restriction since about 1980.

The ownership of respondent's business changed on October 18, 2004, with Tect purchasing Tru-Circle. At about the same time, claimant transferred to a new project involving production of B-52 engine mounts. This new project required more standing and welding than claimant was doing before. Claimant testified that when the new project began, he began developing more problems in his hip. These problems intensified from late October 2004 through May 2005. Claimant also, for the first time, began experiencing a catching or popping sensation in his hip and he began to feel as if his hip was going to give out.

Claimant was referred by respondent Tect on November 29, 2004, to Philip R. Mills, M.D., board certified in physical medicine and rehabilitation. Dr. Mills diagnosed claimant with right groin and medial thigh pain and ordered an MRI to rule out hip versus back pathology. The MRI, performed on November 29, 2004, showed mild lateral subluxation of the right femoral head, irregularity and probably a hip fracture involving the anterior superior aspect of the right acetabulum and articular cartilage. As soon as Dr. Mills read the MRI, he recommended claimant be referred to an orthopedist. Dr. Mills initially testified that claimant's problems were causally related to the March 18, 2004 injury. However, on cross-examination, Dr. Mills agreed that claimant's job as a welder, which involved periods of walking, standing and bending, would be a competent cause of an aggravation of his hip condition. He agreed that continued heavy labor that taxes the joint could continue to worsen the degenerative condition. He agreed that claimant's work on the B-52 project seemed to bother his condition, causing added symptoms.

Claimant was referred to board certified orthopedic surgeon Pat D. Do, M.D., for an evaluation on January 25, 2005. Dr. Do diagnosed claimant with osteoarthritis and degenerative joint disease of the right hip. He testified that claimant's hip was bone-on-bone and had been so prior to the March 18, 2004 fall. Dr. Do stated that when a patient is bone-on-bone, it does not take much to aggravate the condition. Dr. Do also stated that activities such as running or standing a lot would not necessarily cause additional pathology in the hip. It would probably just cause increased symptoms. He also stated the bone-on-bone condition was not caused by a single event, but had been developing over a long period of time. When Dr. Do was told that claimant's complaints, beginning in late October 2004, increased in both intensity and frequency, he agreed that the increased job activities, specifically the B-52 project, could aggravate claimant's condition. These increased complaints could ultimately lead claimant to a hip replacement. Dr. Do also testified that the increased symptoms would, more than likely, be only a temporary aggravation of claimant's symptoms as opposed to a permanent aggravation of the pathology.

At his attorney's request, claimant was examined by George G. Fluter, M.D., of Advanced Anesthesia Associates and Pain Management. The February 23, 2005 report of Dr. Fluter is attached to the May 3, 2005 preliminary hearing. While medical reports attached to preliminary hearings are not normally included in the final record, absent the taking of the author's testimony,<sup>3</sup> in this case, claimant's attorney, at regular hearing, requested the ALJ include the preliminary hearing in the record. Additionally, both respondent attorneys, in their submission letters to the ALJ, list the May 3, 2005 preliminary hearing, including the five exhibits attached. This is tantamount to a stipulation that the medical records be considered. Therefore, the report of Dr. Fluter will be considered by the Board for the purposes of this appeal.

Dr. Fluter diagnosed claimant with probable internal derangement of the right hip, right greater trochanter bursitis and possible degenerative joint disease affecting the right hip. Dr. Fluter determined that there was a causal relationship between claimant's current pain complaints and his accidental injury of March 18, 2004.

Claimant was referred by the ALJ to board certified orthopedic surgeon John R. Schurman, II, M.D., on June 22, 2005. Claimant was diagnosed with osteoarthritis of the right hip and a hip replacement was recommended. The hip replacement was completed on October 24, 2005. Dr. Schurman testified that claimant's job duties beginning October 18, 2004, played a role in the progression of claimant's condition. Claimant's need for surgery was based on the severity of claimant's symptoms and were a culmination of his initial injury and subsequent aggravations.

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<sup>3</sup> K.S.A. 44-519.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>4</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>5</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>6</sup>

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.<sup>7</sup>

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.<sup>8</sup>

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.<sup>9</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.<sup>10</sup>

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<sup>4</sup> K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

<sup>5</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>6</sup> K.S.A. 2005 Supp. 44-501(a).

<sup>7</sup> *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

<sup>8</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

<sup>9</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

<sup>10</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Injury or personal injury has been defined to mean,

. . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.<sup>11</sup>

The Board finds that claimant has suffered not one, but two accidents in this matter. The first, on March 18, 2004, led to a need for medical treatment and benefits while claimant was in the employ of Tru-Circle. Therefore, Tru-Circle shall be responsible for the costs associated with any medical benefits or temporary disability compensation occurring during its employment of claimant through October 17, 2004. From this record, the Board finds claimant suffered no permanent impairment from this accident.

However, claimant continued working at a job which caused him additional injuries after the sale of Tru-Circle to Tect was accomplished. As noted above, an injury need not be "caused" by the employment. It is enough that a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting accident.<sup>12</sup> Here, the Board finds that claimant's continued employment with Tect aggravated his preexisting hip condition, accelerating claimant's need for a hip replacement. This acceleration continued up to the day claimant last worked before claimant underwent a hip replacement on October 24, 2005. Thus, claimant suffered a series of accidents while employed with Tect. Tect would be responsible for any medical treatment provided and any temporary or permanent disability compensation paid, beginning October 18, 2004, and thereafter. The Board, therefore, modifies the Award of the ALJ accordingly. Any disability benefits paid by Tru-Circle for the time period after October 17, 2004, or any medical benefits provided after October 17, 2004, and paid for by Tru-Circle are the responsibility of Tect. Should a dispute arise between the respective respondents and their insurance companies, the matter should be presented to the ALJ for determination of the amount of reimbursement due.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated December 1, 2006, should be, and

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<sup>11</sup> K.S.A. 2004 Supp. 44-508(e).

<sup>12</sup> *Demars, supra.*, at 377.

is hereby, modified to grant claimant an award against Tru-Circle Aerospace and its insurance company Chubb Group of Insurance Companies (Great Northern Insurance Company) for injuries suffered on March 18, 2004, for all benefits due and owing during the period March 18, 2004, through October 17, 2004, including, but not limited to, temporary disability compensation and the cost of any medical benefits incurred during that time period. In addition, claimant is granted an award against Tect Aerospace and its insurance company Zurich American Insurance Company for a series of injuries suffered beginning October 18, 2004, and continuing through October 24, 2005, for 10.20 weeks of temporary total disability compensation incurred after October 17, 2004, for any medical benefits (the cost of which was incurred after October 17, 2004), and for a 22 percent whole body permanent partial functional disability.

Claimant is entitled to 10.20 weeks temporary total disability compensation at the rate of \$467.00 per week totaling \$4,763.40, followed by 91.30 weeks of permanent partial disability compensation at the rate of \$467.00 per week in the amount of \$42,637.10 for a 22 percent permanent partial functional disability, making a total award of \$47,400.50, with the liability for the temporary total disability and the 22 percent permanent partial disability award to be born by Tect and its insurance company.

As of February 27, 2007, there would be due and owing to claimant 10.20 weeks temporary total disability compensation at the rate of \$467.00 per week totaling \$4,763.40, followed by 59.94 weeks of permanent partial disability compensation at the rate of \$467.00 per week in the amount of \$27,991.98, for a total due and owing of \$32,755.83, which is ordered paid in one lump sum minus amounts previously paid. Thereafter, the remaining balance of \$14,645.12 shall be paid at the rate of \$467.00 per week until fully paid or until further order of the Director.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, he must file and submit his written contract with claimant to the ALJ for approval.<sup>13</sup>

**IT IS SO ORDERED.**

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<sup>13</sup> K.S.A. 44-536(b).

Dated this \_\_\_\_ day of March, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Dale V. Slape, Attorney for Claimant  
Jeff S. Bloskey, Attorney for Respondent Tru-Circle and its Insurance Carrier Chubb Group  
Douglas C. Hobbs/Ryan D. Weltz, Attorney for Respondent Tect and its Insurance Carrier Zurich American  
John D. Clark, Administrative Law Judge